APPEAL NO. 93254

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing was convened in (city), Texas, on February 4, 1993, Roger Schultz presiding, to determine the two disputed issues unresolved at the Benefit Review Conference, namely, the date that respondent (claimant) reached maximum medical improvement (MMI) and his correct impairment rating. At the hearing, the parties stipulated that on (date of injury), claimant suffered a work-related injury for which he received medical and temporary income benefits, and that a proper and final impairment rating was six percent as determined by the doctor designated by the Texas Workers' Compensation Commission (Commission) to examine claimant. As for the remaining issue, the hearing officer concluded that the report of the designated doctor stating that claimant reached MMI on August 24, 1992, was not entitled to presumptive weight pursuant to Article 8308-4.25(b) because it was based on a nonwork-related condition (degenerative disc disease) and not upon claimant's work-related injury (two small disc protrusions), and, therefore, that the great weight of the other medical evidence was to the contrary of the designated doctor's report. Appellant (carrier) asserts error by the hearing officer in reaching such conclusion in that it is not sufficiently supported by the evidence. No response was filed by the claimant.

DECISION

Finding that the hearing officer erred in failing to give presumptive weight to the report of the designated doctor, we reverse and render a decision that claimant reached MMI on August 24, 1992.

Claimant testified that on (date of injury), while employed as a transport truck driver, he got down off his tanker truck, slipped, and fell on his buttocks. He finished the shift but visited a hospital emergency room the next day. A record of that visit indicated that claimant was taken off work for three days and his lifting was restricted for 10 days. Claimant said that after his emergency room visit he saw (Dr. B) who diagnosed either a pinched nerve or a pulled muscle and took him off work for three weeks. An Initial Medical Report (TWCC-61) signed by Dr. B stated claimant's diagnosis as lumbar spine strain and the treatment plan as physical therapy (PT) and medications. Claimant said he later asked for a referral to a specialist and began treating with (Dr. G), an orthopedic surgeon, on March 13, 1992. He said Dr. G told him his lower discs "were degenerated," took him off work, and released him to return to work effective November 30th after claimant attended a work hardening program for five weeks. He said he increased his lifting strength from 20 to 50 pounds in that program. Claimant further testified that in June 1992, at the carrier's request, he was examined by (Dr. N), a neurosurgeon, that Dr. N did not feel there was anything wrong with him, and that Dr. N left it up to him as to when he returned to work. He said he was examined by (Dr. A), the designated doctor selected by the Commission, in August 1992. Claimant said that Dr. A told him the x-rays and MRI "show [he] had what Dr. G said [he] had." Claimant maintained that he disagreed with the opinions of Drs. N and A regarding the date he reached MMI because he felt their examinations were less thorough than those

of Dr. G, and because he improved his lifting strength in the work hardening program prescribed by Dr. G after Drs. N and A rendered their reports. He said that when he returned to Dr. G in September, he was advised he would always have pain and might require surgery in the future.

The carrier called employer's dispatcher who testified to matters essentially unrelated to the issue of claimant's MMI date. We further note the hearing officer's Decision and Order reflects the carrier called Mr. I as a witness. However, the hearing record indicates Mr. Ingram did not testify.

Dr. G's records indicate he began treating claimant, then 37 years of age, on March 13, 1992, and that claimant's pain complex was primarily lumbar back pain. Claimant's neurological examination was normal and his x-rays revealed mild L4-5 and L5-S1 disc space narrowing. Dr. G found claimant's clinical exam and radiographs "most consistent for an underlying degenerative disc disease with primarily mechanical back findings." Dr. G's impression was "lumbar back pain secondary to L4-5 and L5-S1 degenerative disc disease," and he kept claimant off work and scheduled an MRI. Dr. G's review of the MRI results on March 30th noted small posterior disc protrusions at L4-5 and L5-S1 with moderative thecal effacement at the L4-5 level with no frank nerve root compression, and neural foramina patent at the L5-S1 level with no nerve root or thecal compression. Dr. G stated that claimant was symptomatic from an L4-5 and L5-S1 subligamentous disc herniation and characterized his symptoms as "primarily mechanical back pain." Dr. G placed claimant on a PT regimen and kept him off work. In his report of May 22nd, Dr. G stated that claimant remains symptomatic from his L4-5 and L5-S1 subligamentous disc herniations and that "[h]e has primarily symptoms referable to degenerative disc herniations with no radicular or nerve root compression." Dr. G continued claimant's medications and PT program, as well as his home exercise and walking programs.

At the carrier's request, claimant was examined by Dr. N, a neurosurgeon. According to his narrative report of June 23rd, Dr. N examined claimant and reviewed the x-rays, the MRI, and Dr. G's records. Dr. N could find no organic cause of claimant's complaints and felt claimant could return to work without limitation. Dr. N stated that the disc bulges shown on the MRI were "insignificant" and that the loss of signal of the L4 and L5 discs "are most probably secondary to loss of water content in the discs, secondary to the aging process and not produced or aggravated by the accident in question." The Report of Medical Evaluation (TWCC-69), signed by Dr. N and referencing the narrative report, stated that claimant had reached MMI "now," with a zero percent whole body impairment rating.

Dr. G's July 21st report to the carriers' adjustor stated he had reviewed Dr. N's report. Dr. G saw the MRI findings as "significant." He felt claimant had not reached MMI with conservative care and "may benefit additionally" from more PT and back school instruction.

The August 24th narrative report of the designated doctor (Dr. A) stated that he examined claimant, as well as the x-rays and the MRI, and that claimant has "degenerative disc disease at two levels, L4-5 and L5-S1;" that though claimant is symptomatic, he can return to work but should avoid the prolonged sitting and bouncing experienced by truck drivers; and that with anti-inflammatory medications and the work program he was then undergoing, claimant should be able to control his symptoms and keep gainfully employed. Dr. A's report concluded: "He's got a stationary problem and he is ready for a rating. He's got a PPI of 6% of the whole person based on MRI findings though certainly the degenerative changes were pre-existing." Dr. A's TWCC-69 stated that claimant reached MMI on August 24th with a six percent whole body impairment rating for his low back.

Dr. G saw claimant on September 11th, recommended his entry into a work hardening program after which claimant would undergo a functional capacity evaluation to obtain objective return to work parameters, and continued claimant's home exercises and his medications. On September 16th, Dr. G prescribed five weeks of work hardening to be followed by a functional capacity evaluation. Claimant's final functional capacity evaluation, dated October 27, 1992, stated that he should tolerate returning to work at the medium physical demand level provided he is able to manage his pain level, and commented that claimant's high scoring on the pain questionnaire "suggests inappropriate illness behavior." Dr. G signed a TWCC-69 which stated that claimant reached MMI on November 20, 1992, with a 15 percent whole body impairment rating. This report referenced the positive MRI for the L4-5 and L5-S1 discs, and stated the body part subject to the impairment rating as "lumbar."

Article 8308-4.25(b) provides, in part, that if a dispute exists as to whether an employee has reached MMI, the employee will be examined by a designated doctor whose report shall have presumptive weight, and that the Commission shall base its determination as to whether the employee has reached MMI on that report unless the great weight of the other medical evidence is to the contrary. The hearing officer found as fact that "[t]he injury suffered by the Claimant in his fall of (date of injury), was a small posterior disc protrusion at the L4-5 level with moderate thecal effacement with no nerve root compression and a small posterior disk (sic) protrusion at the L5-S1 without nerve root or thecal compression." This finding is taken nearly verbatim from Dr. G's report of March 30th which reviewed the MRI results. The hearing officer then found that the designated doctor's certification of MMI as of August 24th was "not based on the Claimant's work related injury to his L4-5 and L4-S1 (sic) discs." The hearing officer concluded that claimant reached MMI on November 22nd, the date certified to by his treating doctor, and further concluded as follows:

> The report of the designated doctor is not entitled to presumptive weight because it is based on a non-work related condition and not the Claimant's (date of injury) injury; therefore the weight of the other medical evidence to the contrary is

greater than that of the designated doctor as to the date the Claimant reached [MMI].

Both Drs. N and A expressed opinions that claimant's L4-5 and L5-S1 disc problems existed prior to his injury date. However, the parties stipulated that claimant sustained a work-related injury on January 31st, and the hearing officer found that claimant suffered a work-related injury on that date "when he slipped on a diesel fuel water mixture and fell landing on his buttocks." We have held that the aggravation of a preexisting condition can constitute a compensable injury under the 1989 Act. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991.

It seems clear to us that Drs. G, N, and A were all focusing on claimant's complaints of pain associated with injury to his lumbar spine at the L4-5 and L5-S1 levels. The medical records refer to no injury other than to claimant's lumbar spine at those levels and all contain the history of claimant's slip and fall accident of January 31st. Indeed, the parties stipulated that the six percent impairment rating stated in Dr. A's report, which the hearing officer rejects, was the "proper and final impairment rating." Presumably, this six percent rating assigned by Dr. A and adopted by the parties was based on the determination that claimant had reached MMI on August 24, 1992. The medical records in evidence refer not only to the x-rays but also to the MRI study reviewed by Dr. G in his report of March 30th and later reviewed by Drs. N and A. It was from Dr. G's report of the MRI results that the hearing officer obviously drew his finding that claimant's injury involved the two small disc protrusions. Reading the medical evidence as a whole, however, we believe the hearing officer's finding that Dr. A's report was not based upon claimant's work-related injury to be against the great weight and preponderance of the evidence. The hearing officer apparently reasoned that Dr. A's statement that claimant "has degenerative disc disease at two levels, L4-5 and L5-S1" either did not include, or constituted some injury different than, the "small posterior disc protrusion[s]" of those same discs described in Dr.G's review of the MRI study. However, as mentioned above, Dr. G first felt his clinical exam and the x-rays to be most consistent with an underlying lumbar degenerative disc disease; nowhere states that the subsequent MRI findings of the small disc protrusions evidence a condition or injury other than degenerative disc disease; and, in fact, uses the term "degenerative disc herniations" in his later reports of May 22nd and of January 29, 1993. We do not view the MRI description of small disc protrusions, or Dr. N's description of "minimal bulges," or Dr. G's description of "degenerative disc herniations" to be other than variable descriptions of the degenerative disc disease spoken of by both Drs. G and A.

The hearing officer further erred in concluding that Dr. A's report was against the great weight of the other medical evidence. We have previously stated that a hearing officer who rejects a designated doctor's report because the great weight of the other medical evidence is to the contrary must clearly detail the evidence relevant to his or her consideration, clearly state why the great weight of the other medical evidence is to the

contrary, and further state how the contrary evidence outweighs the designated doctor's report. *See e.g.* Texas Workers' Compensation Commission Appeal No. 93072, decided March 12, 1993. The hearing officer made no attempt to so detail the contrary medical evidence. We can only surmise that the hearing officer must have felt the relative weight of the medical evidence did not much matter since he apparently viewed the designated doctor's report as addressing some medical condition other than claimant's injury. As for such other medical evidence, however, Dr. N believed that claimant had reached MMI as of the date of his examination on June 23rd. Dr. G obviously felt that claimant did not reach MMI until November 22nd after he had completed the five weeks of work hardening. Dr. G's opinion, however, hardly constitutes the great weight of the other medical evidence to the contrary, particularly since both Drs. N and A felt claimant had reached MMI at an earlier date. We have repeatedly emphasized the unique position occupied by the designated doctor (Texas Workers' Compensation Commission Appeal No. 92555, decided December 2, 1992) and have previously observed that "it is not just equally balancing evidence or a preponderance of evidence that can overcome [the presumptive weight given the designated doctor's report]." *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report, including that of a treating doctor, is accorded the special presumptive weight given to the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

The decision of the hearing officer is reversed and a decision is rendered that claimant reached MMI on August 24, 1992.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge